

STATE OF MICHIGAN
COURT OF APPEALS

RICKIE J. WRIGHT,

Plaintiff-Appellant,

v

AMY RINALDO and KOHN & ASSOCIATES,
P.L.L.C.,

Defendants-Appellees.

FOR PUBLICATION

July 10, 2008

9:00 a.m.

No. 275518

Oakland Circuit Court

LC No. 2006-072522-NM

Advance Sheets Version

Before: Saad, C.J., and Borrello and Gleicher, JJ.

SAAD, C.J.

In Mr. Rickie Wright’s legal-malpractice action against his lawyer, Ms. Amy Rinaldo, the trial court granted summary disposition to Rinaldo and her law firm¹ because Wright failed to file his complaint within the applicable two-year period of limitations. For the reasons set forth in this opinion, we affirm the trial court’s holding that plaintiff’s malpractice claim is time-barred.

I. Nature of the Case

Under Michigan’s statutory law, a client’s claim against his or her attorney for professional malpractice accrues on the date that his attorney “discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose” MCL 600.5838(1). The client’s action for malpractice is time-barred unless it is brought within two years from the date the claim accrued or arose (i.e., the date that services were discontinued), or within six months of the date that “the plaintiff discovers or should have discovered the existence of the claim,” whichever date occurs later. MCL 600.5805(6); MCL 600.5838(2); *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006). Here, the client, Wright,

¹ Rinaldo worked for Kohn & Associates, P.L.L.C., at the time this claim arose, and Wright sued both Rinaldo and the law firm for Rinaldo’s alleged malpractice. However, for ease of reference, and because Rinaldo’s conduct is at issue, we refer to Rinaldo alone for the remainder of this opinion.

unquestionably knew of his lawyer's alleged malpractice before Rinaldo ceased representing him; therefore, the timeliness of Wright's filing of his complaint depends on the date that his attorney discontinued services. Rinaldo says this accrual date is December 18, 2003, when Wright in essence ended the relationship, albeit without formally informing Rinaldo. Rinaldo maintains, and we agree, that Wright effectively terminated the attorney-client relationship on December 18, 2003, when he (1) hired other attorneys to handle his patent application, (2) executed documents revoking her power of attorney, and (3) granted one of his new lawyers power of attorney to represent him in the patent-application process. The evidence also shows that Wright concealed from Rinaldo (1) his dissatisfaction with her performance, (2) his intent to sue her for malpractice, and (3) the fact that he had replaced her with other lawyers, because he needed her testimony in a related lawsuit and also because he wished to postpone the accrual date of his malpractice claim so that his cause of action would not be time-barred.

Accordingly, by virtue of Wright's actions, the attorney-client relationship ended on December 18, 2003, notwithstanding Wright's "strategic concealment" of his conduct from Rinaldo. Wright's malpractice suit was therefore untimely because he delayed filing it until February 16, 2006, more than two years after the accrual date of December 18, 2003.

II. Facts and Procedural History

Beginning in August 2000, Rinaldo represented Wright to prosecute his patent application and amendments for an absorbent "surface protection system mat" and, as counsel, filed various documents with the United States Patent and Trademark Office. During the summer and fall of 2003, Wright became dissatisfied with Rinaldo's work. At the time, Wright was also represented by attorney Michael Nedelman in a bankruptcy matter. Wright also intended to have Nedelman pursue litigation to enforce Wright's patent rights against his former business partner, Wade Waterman, and other companies that were marketing a surface-protection mat that was similar to Wright's invention.

By October 2003, Wright and Nedelman began to consult with another patent attorney, Arnold Weintraub, about the enforceability of Wright's patent, and Wright ultimately directed Weintraub to undertake all the legal work for the patent. To this end, *on December 18, 2003*, Wright met with Nedelman and Weintraub and signed a document issued by the patent office that *revoked Rinaldo's power of attorney*. At the same time, Wright executed a power of attorney for Weintraub and instructed the patent office that all future correspondence should go to Weintraub. The power of attorney authorized Weintraub to prosecute the patent and "to transact all business in the United States Patent and Trademark Office connected therewith." On the same day, Wright also signed an affidavit that Nedelman notarized. It appears that the affidavit was drafted in an effort to remove Waterman's name from Wright's floor-mat patent. In this affidavit, Wright blamed the error in designating Waterman as a co-inventor on Rinaldo, whom he identified as his "*previous counsel*." Wright also asserted in the affidavit that he had "retained new patent counsel."

The record reflects that, after the revocation, Wright and his attorneys were reluctant to communicate with Rinaldo because they believed that Rinaldo's favorable testimony was critical to Wright's lawsuit against Waterman. Indeed, after Wright obtained the favorable testimony he sought from Rinaldo, Wright ceased all communication with her.

On February 23, 2004, Weintraub filed a “preliminary amendment” with the patent office to add new claims to the description of Wright’s floor-mat invention. Weintraub signed the documents and also sent to the patent office the December 18, 2003, documents that granted him power of attorney and revoked Rinaldo’s power of attorney. The record reflects that, though no one corresponded with Rinaldo after she signed the affidavit, Wright remained concerned about Rinaldo’s continuing role in providing favorable testimony in the litigation against Waterman. However, around the same time, Wright and Nedelman began to consult with attorneys about filing a malpractice action against Rinaldo. Wright also advised Weintraub that Nedelman should participate in the attorney consultations because he needed Rinaldo’s testimony before they filed the malpractice action. Wright also expressed concern that the period of limitations for his claim against Rinaldo might expire.

In October 2005, Rinaldo sent Wright a letter to advise him that the maintenance fee for his patent was due on March 10, 2006. Rinaldo testified that, although she did not represent Wright as his attorney at that time, she had calendared his maintenance-fee dates and, when the date was flagged, she alerted Wright so that she would not be blamed if he allowed the patent to lapse. Rinaldo’s letter further stated that, if Wright wanted her or her firm to pay the fee, he would need to pay a retainer fee in advance.² Wright ultimately had Weintraub pay the maintenance fee for the patent.

Later, in October 2005, Rinaldo sent another letter to Wright, indicating that she had received correspondence from the patent office that it had disallowed some claims she filed in May 2003. Rinaldo also stated that she had received notice from the patent office that her power of attorney had been revoked, and she asked for information about where to send the file. Wright was upset to learn that Weintraub had submitted the revocation of Rinaldo’s power of attorney to the patent office. He wrote to Weintraub and complained that Nedelman and Weintraub had always taken the position that Rinaldo needed to remain the attorney of record with the patent office if they wanted to timely file a legal-malpractice action against her.

Thereafter, Weintraub informed Wright that had he replied to correspondence from the patent office that had been erroneously sent to Rinaldo. Weintraub wrote the following in his response to the patent office:

Kohn & Associates, Farmington Hills, Michigan prosecuted the above United States Patent 6,446,275 and on May 12, 2003 filed this reissue application. On December 18, 2003, Applicant (Mr. Rickie Wright) revoked the Power of

² After he received the letter, Wright wrote to Nedelman and Weintraub and stated:

What response (if any) should I make to Amy regarding the letter she sent to me.

She will get suspicious if I do not respond.

Attorney to Kohn & Associates and appointed the undersigned (Mr. Arnold S. Weintraub) as his attorney to prosecute all business associated with this matter.

Wright filed this legal malpractice action against Rinaldo on February 16, 2006. Specifically, Wright alleged that Rinaldo had (1) failed to promptly remove Waterman from the patent application, (2) improperly drafted documents submitted to the patent office, and (3) failed to recognize and take steps to correct the patent because it did not adequately protect Wright's invention. The trial court granted Rinaldo's motion for summary disposition, held that Wright and Rinaldo's attorney-client relationship ended on December 18, 2003, and, therefore, ruled that Wright's February 2006 complaint was barred under the two-year statute of limitations.

III. Analysis³

The primary purposes behind statutes of limitations can be summarized as (1) encouraging the plaintiffs to diligently pursue claims and (2) protecting the defendants from having to defend against stale and fraudulent claims. *Lemmerman v Fealk*, 449 Mich 56, 65; 534 NW2d 695 (1995). In *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982), our Supreme Court enumerated several policy considerations underlying statutory limitations periods, including security against stale demands when circumstances would be unfavorable to a just outcome, the avoidance of inconvenience resulting from delay in asserting legal rights, and penalization of plaintiffs who have not been industrious in pursuing their claims.

Pursuant to MCL 600.5805(6) and MCL 600.5838(2), a plaintiff must file a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later.⁴ The parties agree that Wright's knowledge of Rinaldo's alleged malpractice clearly preceded the last day of service and that the operative date is the date of Rinaldo's last service as Wright's attorney. The parties disagree about when that occurred.⁵ "Generally, when an

³ Pursuant to MCR 2.116(C)(7), the trial court granted summary disposition to defendants because Wright's claim was barred by the statute of limitations. As this Court explained in *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005):

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is properly granted under MCR 2.116(C)(7) when an action is time-barred. *Id.* at 118 n 3. *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002). "[A]bsent disputed questions of fact, whether a cause of action is barred by a statute of limitations is a question of law that this Court also reviews de novo." *Id.* at 450 (citation omitted).

⁴ *Kloian, supra* at 237.

⁵ We agree with Rinaldo that the trial court simply made a clerical error when, at the end of its opinion and order, it stated that "clearly Rinaldo's representation of [Wright] ended when he
(continued...)

attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court.” *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002).⁶ Retention of an alternate attorney effectively terminates the attorney-client relationship. *Kloian, supra* at 237. The dispositive question is when did Wright effectively terminate Rinaldo’s representation of him in this patent application.

Rinaldo testified that, at a meeting on November 7, 2003, it was made clear to her by Wright, and Nedelman and Weintraub, that she no longer represented Wright as his patent counsel. Also, significantly, Wright signed the revocation of Rinaldo’s power of attorney on December 18, 2003, and, on the same day, he signed another document granting power of attorney to Weintraub. As Weintraub later represented to the patent office, Wright’s revocation and Weintraub’s appointment both occurred when Wright signed the papers on December 18, 2003. Indeed, from Weintraub’s assertions to the patent office, it is clear that he believed that he was acting as Wright’s sole patent counsel as of December 18, 2003. On the same date, Wright also signed a notarized affidavit in which he referred to Rinaldo as his former attorney and stated that he had retained new counsel.

Though Wright claims that he intended Weintraub and Rinaldo to act as “co-counsel,” his own actions belie this assertion. Wright would have had no reason to revoke Rinaldo’s power of attorney if he had intended her to continue representing him along with Weintraub. Rather, Wright substituted Weintraub as his attorney by authorizing Weintraub “to transact all business in the United States Patent and Trademark Office connected” with his floor-mat patent. While Wright claims that mere “consultation” with another attorney does not end an attorney-client relationship, the evidence we have outlined shows that he not only consulted with Weintraub, but appointed him as his new counsel. And, though Rinaldo drafted language to correct the patent or expand its protection in November and December 2003, Wright later had Weintraub file his own changes with the patent office.

Rinaldo presented further evidence that, as early as October 28, 2003, Wright directed Weintraub to correct Rinaldo’s alleged mistakes and that, by November 2003, Nedelman had determined that Rinaldo was “doing nothing of value” while he and Weintraub were reworking Wright’s patent claims. In the November 24, 2003, e-mail from Wright to Nedelman, Wright asserted that he would no longer communicate with Rinaldo, and he directed that Weintraub

(...continued)

filed a revocation of the power of attorney on December 18, 2003, more than two years before the date the instant Complaint was filed.” (Emphasis added.) As is clear from the rest of the trial court’s opinion, the court believed that the attorney-client relationship ended when Wright executed the documents that revoked Rinaldo’s power of attorney and granted it to Weintraub, not when Weintraub filed the documents with the patent office.

⁶ We note that Wright has changed his position with regard to the accrual date. In the trial court, Wright argued that the revocation of Rinaldo’s power of attorney was not effective until the patent office officially accepted it in October 2005. Now he argues that the revocation did not occur until Weintraub mailed the revocation to the patent office on February 23, 2004. However, the evidence shows that Wright replaced Rinaldo with other counsel, Weintraub, well before the patent office was informed of the change.

“take charge” of the patent prosecution. Indeed, from the time Wright signed the documents on December 18, 2003, he had Rinaldo perform no work on the patent prosecution—the very matter for which he had retained her.

Though Wright maintains that he never explicitly informed Rinaldo of her termination as his counsel or formally relieved her of her duties, his actions show that the attorney-client relationship was, in fact and law, terminated as of December 18, 2003.⁷

In response to the substantial evidence that Wright discharged Rinaldo as his attorney by December 18, 2003, Wright takes the position that the rules in the Manual of Patent Examining Procedure (MPEP) determine when a claim accrues because the rules define when an attorney may withdraw from representing a client in the patent office. According to Wright, the rules state that a withdrawal or revocation does not occur until the patent office approves it. Wright cites no authority to support his claim that MPEP rules take precedence over Michigan law in determining the state-law matter of whether a malpractice action is timely. Wright merely maintains that, because the underlying case involved a patent issue, the patent office’s rules should govern. However, as the trial court pointed out, the rules Wright cites only state that the *withdrawal* of patent counsel is effective upon approval by the patent office. The rules do not state that the *revocation* of a power of attorney is only effective when it is approved. Further, as Rinaldo’s evidence established, Wright did not merely revoke her power of attorney, he granted the power of attorney to new counsel, Weintraub, and specifically directed him to take over the patent prosecution. Again, a formal discharge is not required to end an attorney-client relationship, particularly when, as here, a client has retained new counsel. *Mitchell, supra* at 682-684.

In an effort to prove an accrual date after December 18, 2003, Wright also presented evidence that, in October 2005, Rinaldo wrote to Wright to advise him that he must file a maintenance fee for his patent. Wright claims that this shows that Rinaldo saw her professional relationship with Wright as ongoing. In response, Rinaldo testified that she had calendared Wright’s maintenance-fee schedule when he was a client and that she received notification in October 2005 that the fee was due. She further testified that, although she did not consider herself to be Wright’s attorney, she sent the reminder letter so that she would not be blamed if the patent lapsed. Regardless of her reasoning, Rinaldo’s ministerial task of sending a reminder letter to Wright did not extend the accrual date. Rather, Rinaldo’s notification falls within the category of matters outlined in *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538-539; 599 NW2d 493 (1999):

A lawyer has an ethical duty to serve the client zealously. See, e.g., *Grievance Administrator v Fried*, 456 Mich 234, 242; 570 NW2d 262 (1997); *American Employers' Ins Co v Medical Protective Co*, 165 Mich App 657, 660; 419 NW2d 447 (1988). Some of a lawyer’s duties to a client survive the

⁷*Mitchell, supra* at 684 (“[N]o formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client.”).

termination of the attorney-client relationship, most notably the general obligations to keep client confidences and to refrain from using information obtained in the course of representation against the former client's interests. See MRPC 1.6 and 1.9 and comments. Sound public policy would likewise encourage a conscientious lawyer to stand ever prepared to advise a former client of changes in the law bearing on the matter of representation, to make a former client's file available if the former client had need of it, and, indeed, to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention. *To hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention.* We conclude that the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship. [Emphasis added.]

Rinaldo specifically stated in her letter that, if Wright wanted her to follow up with the patent maintenance, he would have to remit a retainer fee. Further, Wright had vowed not to speak to Rinaldo and, indeed, he did not speak to her after he signed the revocation on December 18, 2003. As Rinaldo observes, Wright did not even know how to respond to her maintenance-fee letter, but feared that if he did not respond, she would "get suspicious." This conduct is inconsistent with an ongoing professional relationship between Wright and Rinaldo, particularly given that Wright had obtained different patent counsel, did not permit Rinaldo to work on any further patent matters, and had no communication with her for almost two years.

In sum, Wright's conduct clearly demonstrated that he ended the attorney-client relationship with Rinaldo no later than December 18, 2003, although he did so in a somewhat unorthodox fashion. And, because Wright failed to file his legal-malpractice complaint until February 16, 2006, the trial court correctly ruled that his malpractice claim was barred by the two-year statute of limitations.

Affirmed.

Borrello, J., concurred.

/s/ Henry William Saad

/s/ Stephen L. Borrello